

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Oct 30, 2024

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ADAM PERSELL,

Plaintiff,

v.

AARON BROWN, DANIEL JONES,
KERRY DEYOUNG, LEONA
CHAPMAN, DAWSON BRICKEY,
ALEX ROCKSTROM, ZACHARY
ESPINOZA, JONATHAN
MARTINEZ, and STEVEN NIELSEN,

Defendants.

NO: 2:24-CV-0367-TOR

ORDER DISMISSING ACTION

BEFORE THE COURT is Plaintiff Adam Persell's First Amended Complaint. ECF No. 11. Plaintiff, a prisoner currently housed at the Airway Heights Corrections Center, is proceeding *pro se* and *in forma pauperis*. ECF No. 5. Defendants have not been served.

The Court severed Plaintiff's claims from those of Co-Plaintiffs Kurt Jeffrey Angelone and John Griffin Headrick, and directed that Plaintiff proceed in his

1 individual action. ECF No. 12. Plaintiff seeks monetary damages for alleged Eighth
2 Amendment violations and state law claims of negligence, breach of duty of care,
3 medical negligence, and intentional tort. ECF No. 11 at 3–9.

4 As a general rule, an amended complaint supersedes the original complaint
5 and renders it without legal effect. *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 927 (9th
6 Cir. 2012). Therefore, “[a]ll causes of action alleged in an original complaint which
7 are not alleged in an amended complaint are waived.” *King v. Atiyeh*, 814 F.2d 565,
8 567 (9th Cir. 1987) (citing *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th
9 Cir. 1981)), *overruled in part by Lacey*, 693 F.3d at 928 (any claims voluntarily
10 dismissed are considered to be waived if not repelled).

11 Furthermore, defendants not named in an amended complaint are no longer
12 defendants in the action. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir.
13 1992). Therefore, Defendants Washington State Department of Corrections,
14 Superintendent Ronald Haynes, AHCC, Lance Hall, Sgt. D. Young, Sgt. McKinney,
15 Jane and John Doe Correctional Officers and Personnel from the original complaint
16 were terminated and Defendants Kerry DeYoung, Leona Chapman, Dawson
17 Brickey, Alex Rockstrom, Zachary Espinoza, Jonathan Martinez and Steven Nielsen
18 were added.

19 Liberally construing the entirety of the First Amended Complaint in the light
20 most favorable to Plaintiff, however, the Court finds that he has failed to state a

1 claim upon which this Court can grant him relief.

2 **PLAINTIFF’S ALLEGATIONS**

3 Plaintiff accuses First Shift Commander Lieutenant Aaron Brown of using
4 excessive force in violation of the Eighth Amendment. ECF No. 11 at 3. He also
5 accuses Defendant Brown of being deliberately indifferent to his serious medical
6 needs. *Id.* at 5. He accuses the additional eight Defendants of failing to intervene.
7 *Id.* at 6–7.

8 Plaintiff states that on February 15, 2023, at approximately 3:00 a.m.,
9 Defendant Brown conducted an unauthorized training exercise with (CS) tear gas
10 obtained without authorization from the prison armory, and without a certified
11 instructor. *Id.* at 3. He avers Defendant Brown released a CS gas grenade near the
12 unit where Plaintiff was housed, exposing prisoners to the gas via the HVAC system.
13 *Id.*

14 Plaintiff states that he woke to “burning skin and eyes, with a extreme
15 difficulty breathing[,]” and was “exposed to prolonged and intense pain for several
16 hours.” *Id.* at 4 (as written in original). Plaintiff states, “[t]he gas was blown
17 through the vent for approximately 30 minutes before the system was shut down.”
18 *Id.* Plaintiff states he suffered “intense burning of both eyes, nose, throat, lungs and
19 skin” and was “denied medical attention.” *Id.*

20 Plaintiff asserts he was “yelling for help, making pleas to be let out of his cell

1 to see medical and asking what was happening. Defendant Aaron Brown's response
2 was no, he's not allowing anybody out and it could possibly be an electrical fire. I
3 continued to ask for help and he obviously knew exactly what happened and knew
4 he was the one who released the gas." *Id.* at 5. Plaintiff asserts Defendant Brown
5 "knew it was mandatory to have the plaintiff decontaminated from the constant
6 exposure" but he was "deliberately indifferent to plaintiffs medical needs." *Id.* (as
7 written in original).

8 Plaintiff asserts that Defendant Brown's actions "also constituted negligence,
9 medical negligence, gross negligence standard of care, breach of duty, use of force."
10 *Id.* at 6. Plaintiff accuses Defendant Brown of failing to "follow D.O.C. policies,
11 protocols, state and federal laws as they relate to igniting CS gas grenades against
12 prisoners." *Id.* Plaintiff states he "now has trouble sleeping because of fear that he
13 will be gassed again while sleeping. Problems catching his breath and breathing,
14 sinus problems." *Id.* (as written in original).

15 The Eighth Amendment's prohibition of cruel and unusual punishment
16 imposes duties on prison officials to provide prisoners with the basic necessities of
17 life such as food, clothing, shelter, sanitation, medical care and personal safety. *See*
18 *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *Helling v. McKinney*, 509 U.S. 25,
19 31 (1993). To state a claim for unconstitutional conditions of confinement, a
20 prisoner must allege that a Defendant's acts or omissions deprived the prisoner of

1 “the minimal civilized measure of life's necessities” and that the Defendant acted
2 with deliberate indifference to an excessive risk to inmate health or safety. *See*
3 Farmer, 511 U.S. at 834.

4 Plaintiff has alleged no facts from which the Court could infer that Defendant
5 Brown was deliberately indifferent to the risk of CS gas exposure. While Plaintiff
6 later asserts that “[D]efendant Brown was going to purposely going to expose
7 prisoners to CS gas[,]” and that eight other Defendants failed to intervene, ECF No.
8 11 at 7 (as written in original), his attached exhibits contradict that any exposure was
9 intentional. Based on Plaintiff’s exhibits, Aaron Brown attested to the truth and
10 accuracy of the following statement he made on March 23, 2023: “When the CS
11 accidentally made it to the unit, my chest sunk.” ECF No. 11-1 at 6.

12 Aaron Brown further attested, “I did not notify medical because I personally
13 checked on any I/I awake. They all said they were ok other than a slight burning. If
14 one of them had claimed a medical emergency or emergency grievance then I would
15 of contacted medical.” *Id.* (as written in original). In an additional attestation dated
16 March 22, 2023, Aaron Brown stated, “Most all the I/I’s that complained of burning
17 eyes and smoke had gone back to sleep, by the time I had left the unit.” *Id.* at 10.

18 Yet another attestation dated March 20, 2023, by a person with the initials
19 “SL” and an unclear signature, states that incarcerated individuals were experiencing
20 a “[l]ittle coughing and the complaining of what the smell was. There was one

1 comment that we gassed them. We did not tell them what it was that they smelled
2 . . . One guy, I think in a corner cell kept complaining and wanted to be let out, but
3 he was not let out. We did talk with him, and he appeared fine. We did tier checks
4 and talked with anyone that was awake and affected. Before we left the unit, most
5 all I/I's had their lights back off and went back to bed. I did mention to the
6 Lieutenant that he should alert someone asap of this situation.” *Id.* at 16.

7 When exhibits are attached to a complaint, the exhibits are deemed part of the
8 complaint for all purposes, including for purposes of determining the sufficiency of
9 the claims. *See* Fed.R.Civ.P. 10(c); 5A Wright & Miller, Federal Practice and
10 Procedure: Civil 3d § 1327, at 443–44 (2002). If an exhibit attached to a complaint
11 contradicts an assertion in the complaint and reveals information that prohibits
12 recovery as a matter of law, the information provided in the exhibit trumps the
13 allegation in the complaint. *Wilson v. Fitter*, 2009 WL 6908049, at *2 (C.D. Cal.
14 Nov. 5, 2009) *report and recommendation adopted*, 2010 WL 3893992 (C.D. Cal.
15 Sept. 30, 2010) (citing *Riggins v. Walter*, 279 F.3d 422, 425–26 (7th Cir. 1995)
16 (affirming dismissal of prisoner's § 1983 claims where information in attached
17 exhibit contradicted allegation of complaint); *Hudson v. Phillipson*, 2008 WL
18 356884, *3 (W.D. Mich. Feb.7, 2008) (dismissing prisoner's § 1983 claims where
19 information in attached exhibits conflicted with allegations of complaint)).

20 Here, the attached attestation of an accident does not support an Eighth

1 Amendment claim that Defendant Brown acted with deliberate indifference to
2 Plaintiff's safety when deploying the tear gas. While Defendant Brown may have
3 acted negligently or in violation of DOC policy, such claims do not state a
4 constitutional violation. *See Davidson v. Cannon*, 474 U.S. 344, 347–48 (1986)
5 (Negligence is not actionable in an action pursuant to 42 U.S.C. § 1983); *Cousins*
6 *v. Lockyer*, 568 F.3d 1063, 1070 (9th Cir. 2009) (The failure to follow prison policy
7 does not establish a constitutional violation). Without an underlying constitutional
8 violation, Plaintiff's allegations that eight additional Defendants failed to intervene
9 to prevent the deployment of the tear gas will not support a claim to relief. *See* ECF
10 No. 11 at 6–7.

11 Furthermore, Plaintiff's assertion that he was denied medical attention is
12 contradicted by the attestation of Defendant Brown that, "If one of them had claimed
13 a medical emergency or emergency grievance then I would of contacted medical."
14 ECF No. 11-1 at 6 (as written in original). Because this attestation trumps the
15 allegation in the First Amended Complaint, the Court cannot infer deliberate
16 indifference on the part of Defendant Brown to Plaintiff's serious medical needs. As
17 presented, Plaintiff has failed to state an Eighth Amendment claim upon which this
18 Court can grant relief.

19 Under the circumstances of this case, the Court finds that further amendment
20 would be unavailing. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d

1 1034, 1041 (9th Cir. 2011). In the absence of a viable federal constitutional claim,
2 the Court will decline to exercise supplemental jurisdiction over Plaintiff's state law
3 claims. *See* 28 U.S.C. § 1367(c)(3). Nevertheless, the Court will dismiss this action
4 without prejudice to Plaintiff pursuing those claims.

5 **ACCORDINGLY, IT IS ORDERED:**

- 6 1. The First Amended Complaint, ECF No. 11, is **DISMISSED without**
7 **prejudice** to Plaintiff pursuing his state law claims in the appropriate forum.
8 2. This dismissal will not count as a dismissal under 28 U.S.C. § 1915(g). *See*
9 *Harris v. Harris*, 935 F.3d 670 (9th Cir. 2019).
10 3. Plaintiff's *in forma pauperis* status is hereby **REVOKED**.
11 4. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal of this
12 Order would not be taken in good faith and would lack any arguable basis in
13 law or fact.

14 The Clerk of Court is directed to enter this Order and Judgment accordingly,
15 provide copies to Plaintiff, and **CLOSE** the file.

16 **DATED** October 30, 2024.



Thomas O. Rice
THOMAS O. RICE
United States District Judge